

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OCCEIDENTAL & ORIENTAL STEAMSHIP COMPANY,
Appellant,

VS.

HENRY F. SMITH ET AL.,
Appellees.

OCCEIDENTAL & ORIENTAL STEAMSHIP COMPANY,
Appellant,

VS.

ELIZA A. SMITH,
Appellee.

*Appeal from the District Court of the United States for the Northern
District of California.*

Appellant's Points and Authorities.

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W. H. L. BARNES AND
FRANK SHAY,

Proctors for Appellant.



NOS. 191 AND 192.

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No. 192.

Appellant's Points and Authorities.

Upon the 22d day of August, 1888, the steamship *City of Chester* left Broadway wharf, in the city and county of San Francisco, State of California,

bound for Eureka, California. As she neared the Golden Gate she ran into a bank of fog, and shortly afterwards came into collision with the steamship *Oceanic*, inward bound, and was so badly injured that she sank, carrying down with her, among others, Henry Smith and his infant daughter Myrta. Two years later Henry F. Smith and George C. Smith, minors, and Eliza A. Smith, for herself, and as administratrix of the estate of Henry Smith, deceased, brought an action at law in the District Court of the United States for the Northern District of California, to recover from the Occidental & Oriental Steamship Company, the owner of the *Oceanic*, and the Pacific Coast Steamship Company, the owner of the *City of Chester*, \$75,275 damages alleged to have been sustained by them by reason of the death of Henry Smith, the father of the minor plaintiffs and the husband of Eliza A. Smith. At the same time Eliza A. Smith brought an action at law in the same court against the same defendants for the recovery of \$20,000 damages, alleged to have been sustained by her by reason of the death of her infant daughter, Myrta Smith. Both actions were brought under the provisions of the Code of Civil Procedure of the State of California. To the complaint first mentioned this appellant demurred upon the grounds of a misjoinder of parties plaintiff; that said complaint did not state facts sufficient to constitute a cause of action; that several causes of action had been improperly united, and that said complaint was ambiguous, unintelligible and uncertain (transcript, page 15 *et seq.*) Said demurrer was overruled, and

in due time said cause came on for trial. The defendant, the Pacific Coast Steamship Company, took advantage of the "Limited Liability Act," abandoned the wreck of its steamship to those claiming damages, and had itself dismissed from both of said actions. At the trial it was agreed between counsel that both cases be tried together, and that separate judgments be entered. When said cases were called for trial, the judge of said District Court raised the point that the District Court of the United States had no jurisdiction to proceed therewith, inasmuch as said actions were, in form, ordinary common-law actions. It was thereupon stipulated by counsel for the respective parties "that these actions, and each of them, are and is a proceeding in admiralty *in personam*; all objections or exceptions to form of summons or citation, or objections to pleadings, as not being in accordance with the admiralty rules and practice of this court, are and is hereby waived; and that the causes may be tried and determined in the same manner and with the same effect as if citation had been issued in each case, instead of summons, and the proceedings were in all respects conformable to the rules of this court in admiralty" (transcript, pages 33, 34).

The trial of the cases was thereupon proceeded with, and in due course the matters were submitted to the Court for decision. On April 23, 1894, decrees were entered in the case of *Henry F. Smith et al. vs. O. & O. S. S. Co.*, in favor of libelants for \$10,000 and costs, and in the case of *Eliza A. Smith vs. O. & O. S. S. Co.*, in favor of libelant for \$1,000 and costs. From each decree the O. & O. S. S. Co. appealed.

The theory upon which plaintiffs attempted to make out a case against this appellant was that, although the management of the *City of Chester* was negligent, yet that of the *Oceanic* was equally so. The defense set up was that there was no negligence upon the part of the officers or crew of the *Oceanic*, but that the collision was due to the careless management of the *Chester*, and to the fact that she became unmanageable in the flood tide then coming in from the ocean.

Mr. Smith and his daughter were passengers upon the *City of Chester*. As a carrier of passengers, the owners of the *Chester* owed these passengers certain duties, and in the discharge thereof were bound to exercise the utmost care and prudence. No such duty was owed them, however, by the owners of the *Oceanic*. The latter were bound to exercise towards the *Chester* and its passengers only ordinary care. No presumption of negligence arose, as against the *Oceanic*, merely because a collision occurred between the two steamships which resulted in the drowning of Henry Smith and his child.

Tompkins vs. R. R. Co., 66 Cal., 163.

Lindall vs. Bode, 72 Cal., 245.

Schmidt vs. Bauer, 80 Cal., 565.

Shearman & Redfield on Negligence, p. 10.

In order to maintain an action for injuries to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled, and this cannot be inferred from

the mere fact of the occurrence of the accident which caused the injury.

Swceny vs. R. R. Co., 10 Allen Rep., 372; S. C.,
87 Am. Dec., 644.

In order to make out a case against the *Oceanic*, it was incumbent upon plaintiffs to prove, by a preponderance of evidence,—actual negligence (the *Joseph Stickney*, 56 Fed. Rep., 156),—the commission of some act which should not have been committed, or the omission to perform some duty which should have been performed, and which act of commission or omission was the direct or proximate cause of the injury complained of. Of such proof there was a total failure in the cases now before the court. There was no proof whatever adduced showing negligence upon the part of the management of the *Oceanic*. On the contrary, the evidence clearly showed the exercise by the officers of the *Oceanic* of great care and caution, and the prompt adoption by them of every means in their power to avert the catastrophe.

The master and pilot of the *Oceanic* did all that reasonable prudence required them to do under the circumstances. To use the language of the U. S. Supreme Court in the *Nevada*, 106 U. S. Rep., 157: “Perhaps
“ they might have done something else which would
“ have been better. The event is always a great
“ teacher. * * * But these possibilities are not
“ the criteria by which they are to be judged. The
“ question is, Did they do all that reasonable prudence
“ required them to do under the circumstances? And

“ this question, we think, must be answered in the
“ affirmative.”

The navigation laws of the United States lay down certain rules which must be observed by vessels. Article 12 provides that a “ a steamship shall be provided with a steam whistle or other efficient steam sound signals, so placed that the sound may not be intercepted by any obstructions. * * * In fog, mist or falling snow, whether by day or night, the signals described in this article shall be used as follows, that is to say :

“ (a.) A steamship under way shall make with her steam whistle or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.”
* * *

Article 13 provides that “ Every ship, whether a sailing ship or a steamship, shall, in a fog, mist or falling snow, go at a moderate speed.”

Article 18 provides that “ Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.”

Article 19 provides that “ In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, namely :

“ One short blast to mean, ‘ I am directing my course
“ ‘ to starboard.’

“ Two short blasts to mean, ‘ I am directing my course
“ to port.’

“ Three short blasts to mean, ‘ I am going full speed astern.’

“ *The use of these signals is optional, but, if they are used, the course of the ship must be in accordance with the signal made.*”

It was in evidence that the proper and usual course pursued by steamships entering the harbor of San Francisco was by the North Head and along the northerly side of the channel, and that the proper and usual course pursued by steamships outward bound was along the southerly side of the channel.

There is very little dispute in the evidence as to the facts connected with the collision between the two steamers. The testimony, as a whole, shows a strict compliance with the navigation laws upon the part of the *Oceanic*.

The evidence proved that the *Oceanic* arrived off the port of San Francisco on the morning of August 22, 1888; that the weather was foggy; that as the steamship entered the harbor its officers and crew were at their proper stations; that an efficient lookout was kept and proper discipline maintained; that the proper fog signal was given and had been given by blasts of the steam whistle sounded at intervals of less than a minute for several hours preceding the collision with the *Chester*; that, for several hours preceding said collision, the speed of the *Oceanic* had been moderate, ranging from half speed to slow, dead slow, and with occasional stops; that, for eleven minutes before the collision, the *Oceanic* had been proceeding “ dead slow,” with just sufficient movement of her engines to main-

tain steerage way ; that when near Point Diablo, in the bay of San Francisco, the master and pilot of the *Oceanic* saw the *Chester* looming up through the fog and at a distance of half a mile ; that the *Chester* was moving at full speed ; that she was two and a half points off the starboard bow or right-hand side of the *Oceanic* ; that immediately thereupon, pursuant to the rules of navigation, the master of the *Oceanic* sounded two blasts of the steam whistle, which meant, " I am going to starboard my helm and pass to the left ; you do the same ; " that at the same time the helm of the *Oceanic* was put hard starboard ; that the master of the *Chester* answered said signal with two blasts of his steam whistle, which meant that the *Oceanic's* signal was understood, that the helm of the *Chester* would be put starboard, and that the vessel would also go to the left ; that had the *Chester* acted on her starboard helm, as she had signaled she would do, the two vessels would have safely passed each other ; that shortly after the first interchange of signals the *Oceanic* again sounded two blasts of her steam whistle, indicating that she was still starboarding her helm and going to the left, and that the *Chester* again answered with two similar blasts, indicating that she understood the *Oceanic's* signal, would starboard her helm and go to the left ; that if, after such second interchange of signals, the *Chester* had starboarded her helm and gone to the left, as agreed, the vessels would have passed each other safely, and there would have been no collision ; that immediately after such second interchange of signals the master of the *Oceanic* observed that the *Chester* was not

passing to the left, pursuant to signal, but bore down upon the *Oceanic* as if under the influence of a port helm; that at the time such fact was observed, immediately upon said second interchange of signals, the master of the *Oceanic* ordered the engines of the vessel to be put to "full speed astern," and that this order was immediately obeyed; that said order was given and obeyed about two minutes before said collision; that at the time of the giving and obeying of said order the *Oceanic* was going "dead slow;" that at the time of the collision the *Oceanic's* headway had been stopped, and that she was beginning to move backward; that at that time the backwash from the propeller was coming forward and reached a point between the funnel and the bridge of the *Oceanic*; that the *Chester* slewed or swung around and struck the prow of the *Oceanic* and was so injured that she sank.

Practically the only conflict in the testimony is as to the exact location of the point of collision. The officers and pilot of the *Oceanic* and the witnesses called by the defense show that the collision occurred in the neighborhood of Lime Point, on the northerly side of the channel. The evidence of these witnesses proves that the *Oceanic* passed the tug *Relief* and the British ship *Lord Wolseley* about two miles outside of Point Bonita an hour or more before the collision; that her course was then a northeasterly one; that she maintained that course, pointing for the northerly shore of the Golden Gate; that she passed into the Golden Gate from a quarter to a half mile from Point Bonita; that the officers of the *Oceanic* could see the loom of the land at Point Bonita

through the fog; that she passed within a quarter of a mile of Point Diablo, and that the officers of the *Oceanic* could see the land at that point down to the water's edge and for 20 feet above it; that they could see Lime Point; that they could not see any object on the southerly shore of the Golden Gate or the bay of San Francisco; that it was usual and proper for vessels entering the harbor of San Francisco, on a flood tide, to come in on the northerly side of the channel; that the *Oceanic* came into port at a moderate speed; that she was carefully, prudently and ably handled and navigated; that her machinery, appliances, steering gear and equipments were in first-class order and condition.

Upon the other hand, some of the officers and passengers upon the *City of Chester* testified that the collision occurred upon the south side of mid-channel.

The evidence proved that the *Chester* left her dock at about 9:15 A. M.; that after getting straightened out and headed down the bay her engines were going "full speed ahead;" that she encountered fog when opposite Black Point, and began sounding her fog signal; that she heard and responded to the two-blast signal sounded by the *Oceanic*, indicating that she would starboard her helm and go to the left; that she responded to the second two-blast signal from the *Oceanic*, indicating that she understood the signal, could and would obey it and go to the left; that she was a vessel of 1,100 tons register; that she had on board only 120 tons of freight and 115 passengers and a crew of 32 men; that a strong flood tide was running into the harbor of San Francisco, through the Golden Gate; that this flood tide struck

the ocean shore below Fort Point and caused a tide-rip which caused a powerful current, with a velocity of five or six miles an hour, to set across the channel in the direction of Lime Point; that when the *Chester* was opposite Fort Point, and immediately before the second interchange of signals between the two vessels, the bow of the *Chester* was struck by said tide-rip, and that vessel was swung around, headed across the channel, and thrown by the force of the current across the bow of the *Oceanic*.

The testimony further showed that there was no confusion or misunderstanding on the part of the master of either vessel with respect to the signals interchanged; that the master of the *Oceanic* believed that the master of the *Chester* could and would do as he had agreed to do, viz., starboard his helm and go to the left; that there was nothing in the situation or in the conduct of the *Chester* to cause the master of the *Oceanic* to think that the *Chester* could not or would not mind her helm and go to the left, until after the second interchange of signals; that as soon as it became evident that the *Chester* was not complying with the signals, and that a risk of collision might reasonably be apprehended, the master of the *Oceanic* reversed his engines, caused them to go full speed astern, and endeavored, by every means in his power, to avoid the danger.

The learned judge of the court below found that the officers of the *Oceanic* were at fault in not stopping and reversing as soon as the *Chester* came in sight, about two minutes before the collision. At that time, however, there was no danger of collision, and the rule

is not that the engines of a steamship must be stopped and reversed when another vessel comes in sight, even though pointing towards her, but only when there is risk of collision. The testimony is uncontradicted that when the two steamships came within sight of each other the *Oceanic* sounded two blasts of the whistle, that the *Chester* responded with two blasts, that a moment or two later these signals were repeated, that *immediately* after the second interchange of signals the *Oceanic* stopped and reversed.

Attention is called to the testimony of Captain Meyer, the pilot (trans., p. 73 *et seq.*), as to when there was any danger of collision.

“Q. If the *City of Chester* had obeyed the signal
“ that you gave to starboard the helm, that would have
“ sent both ships to port and made you pass with the
“ starboard side of each to the other ?

“ A. Yes, sir.

“Q. If, when you gave the first signal, she had gone
“ to starboard and answered your signal, was there any
“ danger of collision ?

“ A. Never.

“Q. If, when you gave the second two blasts, mean-
“ ing ‘we are going to the left,’ and he answered he
“ had gone to the left, if he had minded his helm, then
“ was there any danger ?

“ A. I think there was no danger.

“Q. Just as soon as you saw that there was danger,
“ because she was not minding her helm, I understand
“ you, say you gave the order to your ship to go full
“ speed astern ?

“ A. Yes, sir.

“ Q. Was that order obeyed ?

“ A. Right away.”

Captain Metcalf's testimony upon the same point is as follows (trans., p. 135) :

“ Q. If, at the time the first signal to go to the left
 “ was given and responded to by the *City of Chester*,
 “ she had gone to the left and you had gone to the left,
 “ or kept on your course, was there then the slightest
 “ degree or possibility of a collision between those
 “ vessels ?

“ A. Not any. The *City of Chester*, if she had
 “ altered her course to the left one point, would never
 “ have touched the *Oceanic*.

“ Q. When the second signal was given to go to the
 “ left, if she had then—after responding to your signal
 “ that she would go to the left—had, in point of fact,
 “ gone to the left, would there have been any collision
 “ possible between those ships ?

“ A. None, sir.

“ Q. I understand you to say that immediately upon
 “ perceiving that, notwithstanding she had under-
 “ stood both your signals and responded to both signals,
 “ she was still not going to the left, but was continuing
 “ on the right. What did you do ?

“ A. Put the engines full speed astern.”

Second Officer Bridgett, of the *Oceanic*, testified as follows (trans., p. 269) :

“ Q. If, when the first interchange of signals took
 “ place, the *City of Chester* had been turned to the left

“ and had minded her helm, would there have been any danger of a collision ?

“ A. No, sir, impossible.

“ Q. If, when the second interchange of signals took place, the *City of Chester* had acted as indicated by the signals, would there have been a collision ?

“ A. No, sir ; I do not think there would.”

This testimony was not only not contradicted, but no attempt was made to impeach it. By it is fixed the time when there was danger of collision, within the meaning given to that term by the rules of law. While it may be said that there is always danger of collision where two vessels are approaching or even passing each other, yet, in order to throw upon one vessel or the other the duty of taking active measures to avoid striking the other, there must be an apparent risk as the term is defined by the courts.

In the *Free State*, 9 U. S., 200, which was a case of collision between a steamer and sailing vessel, both navigating in the ascent of the Detroit river, it was held that when a steam vessel is approaching another vessel, and where a collision *may be produced by a departure of the latter from the rules of navigation*, that the former is not bound to slacken her speed or stop and reverse. Each vessel may assume that the other will reasonably perform its duty under the laws of navigation ; and if, upon this assumption, there could be no collision, the case under the sixteenth article, *i. e.*, that every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or, if necessary,

stop and reverse, and every steamship shall, when in a fog, go at moderate speed, does not arise. *The steamer is not bound to take measures to avoid a collision until some danger of collision is present.*

The *Peerless*, 48 Fed. Rep., 844, was a case of collision between the steam tug *Thomas Y. Boyd* and the steam yacht *Peerless*. The latter met the former in the east channel of Hell Gate. On seeing the tug the yacht gave one whistle and ported her helm. The tug immediately responded with one whistle but did not alter her wheel. As soon as the yacht saw the tug did not change her course, she reversed, but too late to avoid the tug, which was sunk. It was held by Brown, J., that the yacht had the right to take the east channel, and her navigation was without fault; that the cause of the collision was the failure of the tug to alter her course in accordance with the whistle, which there was nothing to prevent her from doing, and she was consequently solely liable for the collision. Brown, J., said: “ * * * the evidence shows that * * *
 “ when the exchange of one whistle was made there
 “ would have been no difficulty in passing the tug had
 “ the tug observed her duty. *The yacht had the right*
 “ *to assume that the tug would go to the right, as her*
 “ *whistle and the rule required.* As soon as the whistles
 “ were exchanged the yacht did all that was required of
 “ her in porting her wheel; for there was time enough
 “ and space enough for the tug to go to the right. I
 “ am satisfied that the yacht backed as soon as she
 “ could perceive that the tug was not doing her duty.

“ She was under no obligation to stop and back as soon
 “ as the exchange of one whistle was made, because that
 “ exchange of whistles was a suitable and sufficient
 “ provision for avoiding the collision, had the tug per-
 “ formed her part. That exchange of whistles for the
 “ time being, therefore, DETERMINED THE RISK OF COL-
 “ LISION, as the yacht had the right to assume; and, as
 “ soon as risk of collision could reasonably be appre-
 “ hended anew, the yacht reversed. This was all that
 “ was required of her by the rules or by common sense
 “ and prudence. The collision being, therefore, the fault
 “ of the tug, the libel must be dismissed with costs.”

In the *Thingvalla*, 48 Fed. Rep., 768, the Circuit
 Judge said, in speaking of the duty of the *Thingvalla*
 as soon as she saw the *Geiser* was not doing her duty:
 “ Looking at the situation after the event, it may be
 “ apparent that such a change of course would have
 “ avoided the collision; but the *Thingvalla's* navigation
 “ must be judged by the knowledge she had, or ought
 “ to have had, at the time. * * * Whether she
 “ would realize that fact (violation by the *Geiser* of
 “ crossing rule) and alter her helm accordingly the
 “ navigator of the *Thingvalla* could not know. An
 “ attempt on his own part to abandon his course, which
 “ the rules enjoined upon him in the one case and per-
 “ mitted him in the other, might, so far as he knew,
 “ tend to produce the very mishap it was intended to
 “ avoid, by co-operating with a belated effort on the part
 “ of the *Geiser* to return to her true course, and he
 “ cannot, therefore, be held in fault for taking the

“ chance. He did what the rules required of him :
 “ when seeing the mistaken maneuver of the *Geiser* he
 “ stopped and reversed. There is nothing in the sug-
 “ gestion of improper speed or insufficient lookout.
 “ The vessels sighted each other at sufficient distance
 “ to avoid collision without any difficulty, had there not
 “ been improper navigation of the *Geiser* after sight-
 “ ing.”

In the *Greenpoint*, 31 Fed. Rep., 231, which was a case of collision between the steamers *Grand Republic* and the *Greenpoint*, the Court says: “ I cannot
 “ find upon the proofs any satisfactory evidence of
 “ fault in the *Greenpoint*. She could not tell precisely
 “ what the *Grand Republic* was able to do in her
 “ maneuvers. As soon, I think, as the danger of col-
 “ lision was apparent, the *Greenpoint* stopped and
 “ reversed. She did so as soon, I think, as could
 “ reasonably have been judged necessary, considering
 “ what the *Grand Republic* at first would be presumed
 “ able to do. For a certain time the *Greenpoint* had a
 “ right to rely upon the ability of the *Grand Republic*
 “ to do what she undertook to do, viz., go ahead with-
 “ out injury to the *Greenpoint*.”

In the case of the *Ulster*, 1 Maritime Law Cases, 234, Lord Chelmsford, in the Privy Council, says of the *Tagus*, which, though crossing the Mersey, was intending to turn down the stream, that the *Ulster* “ was entitled
 “ to take for granted that the *Tagus*, intending to turn
 “ her head down the river, would resort to all the means
 “ proper for the purpose, and would have no difficulty

“ in succeeding in her object. The *Ulster* pursued the
 “ safe and proper course of not shifting her helm, under
 “ the reasonable expectation that the *Tagus* would do
 “ what she evidently proposed to do, and which she had
 “ the means at command of accomplishing.”

See also

The *Argus*, Olcott, 313.

The *Baltic*, 2 Ben., 98.

The *Servia*, 30 Fed. Rep., 502.

The *Noordland*, 13 Supreme Ct. Rep., 817.

In the last case the Supreme Court of the United States, April 1893, says: “ The *Servia*, therefore, had a
 “ right to assume that the *Noordland* would head
 “ down the river, and proceed to sea. It became the
 “ duty of the *Servia* only to proceed carefully on her
 “ course, keeping watch of the *Noordland*. No danger
 “ was apparent. The *Servia*'s course was well clear of
 “ the *Noordland*, and of the course which the *Servia* had
 “ the right to believe the *Noordland* would promptly
 “ take (Mars. Mar. Coll. [ed. 1880], 233; the *Ulster*,
 “ 1 Marit. Law Cas., 234; the *Scotia*, 14 Wall., 170; the
 “ *Free State*, 91 U. S., 200; the *Rhondda*, L. R. 8 App.
 “ Case, 549; the *Jesmond* and the *Earl of Elgin*, L. R.
 “ 4 P. C. I.

“ The *Servia* stopped her engines when she got near
 “ enough to see that the *Noordland* continued to make
 “ sternway, and when about one thousand feet away
 “ from her, and immediately afterwards the *Servia* put
 “ her engines at full speed astern, and ported her helm.
 “ It then appeared to the *Servia* that the *Noordland*, in
 “ violation of the usage and of her duty, was proposing

“ to maintain her sternway so as to bring her across
 “ the path of the *Servia*, and that there was danger of
 “ collision. Then it became the duty of the *Servia* to
 “ take measures to avert a collision, which she did, as
 “ above stated.

“ The Circuit Court held that the *Servia* was not
 “ guilty of fault or negligence contributing to the col-
 “ lision. This is a proper conclusion from the findings
 “ of fact that she was properly officered, manned and
 “ equipped; that those in charge of her exercised
 “ proper vigilance in observing the *Noordland*; that
 “ the *Servia* was well over towards the New York
 “ shore, leaving ample room for the movements of the
 “ *Noordland*; that the *Servia* was under slow speed;
 “ that she stopped her engines as soon as she saw that
 “ the *Noordland* was under sternway, although her
 “ engines had been stopped; and that the *Servia* put
 “ her engines at full speed astern as soon as she saw
 “ that such sternway of the *Noordland* was continuing
 “ so as to indicate danger of collision. The *Servia*,
 “ therefore, complied with all the requirements of the
 “ law.

* * * * *

“ The *Servia* maintained her position close to the
 “ New York shore. She proceeded slowly. She
 “ observed the *Noordland* closely. She stopped her
 “ engines when at a safe distance to enable the
 “ *Noordland* to check her own sternway, and she
 “ reversed her engines when the sternway of the
 “ *Noordland* indicated risk of collision. She was
 “ thwarted in her maneuvers by the faults committed

“ by the *Noordland*. It was not incumbent upon the
 “ *Servia* to take any other precautions than she did,
 “ and she did nothing to bring on the risk of collision.”

The foregoing authorities seem to settle the question as to the duty of the *Oceanic* under the conditions here presented.

The learned judge of the court below seemed to be of the opinion that it was the duty of the master of the *Oceanic* to know the exact location of the tide-rip into which the bow of the *City of Chester* passed, and the effect which that tide-rip would or should have had on the *Chester*. It is in evidence that the *Oceanic* was coming into port on a return voyage from China and Japan, and that there was a fog hovering over the bay of San Francisco. It is clear that the master of that vessel did not know the condition of the *Chester* or anything as to her ability to take care of herself, and that the only information that he had upon that point was derived from the signals given by the *Chester*; and these indicated that that vessel could be and would be navigated in a manner which would enable both vessels to proceed in safety.

We contended in the court below, and we contend here, that the irresistible force claimed for the tide might concern the *City of Chester* but did not involve the *Oceanic*. The master of the *City of Chester* knew where it was with reference to the set-off from Fort Point of the young tide; and the master of the *Oceanic* did not know. He supposed that the *Chester* would pass the *Oceanic* on her right—the *Chester* passing to the left,

going out. The master of the *Chester* signaled that he would adopt this navigation presumably in view of all the contingencies which affected the *City of Chester*, its steam power, its ability to mind its helm, its propeller, and the knowledge of its officers of the condition of the tide, and we contend that these considerations were for the *City of Chester's* officers and not for those of the *Oceanic*. The court permitted questions to be put to the officers of the *Oceanic* on this subject, and they were answered. Captain Metcalf was asked :

“ Q. Did you make any allowance in your arrangements for passing the *Chester* for the sheer that this tide would give her ?

“ A. I most certainly did not, because I did not know the position of the *City of Chester* with reference to that tide. It would be absurd for me to make any possible arrangements for her navigation when I could not tell her position with reference to that tide. If the captain of the *Chester* was satisfied that that tide would prevent him acting on his starboard helm, it was his duty to signify that to me by the danger signal, or by going astern, and I would have done the same. I relied upon the seamanship of the captain of the *City of Chester* carrying out the whistle signal that we had given and was answered.”

Again : “ Q. Putting all this information with your knowledge of the direction that this tide ran, did you not know that the *Chester* would be caught in that tide ?

“ A. Assuming the position of the *Chester* to be half a mile from me on my starboard bow when the

“ first signal was given, she was not within the influ-
 “ ence of that tide-rip in the neighborhood of Fort
 “ Point. If her helm had been starboard then, which
 “ is usually done by every steamer going out of the
 “ port on flood tide in order to make that rip, she would
 “ have recovered herself very quickly and gone on her
 “ business.”

To another similar question the same witness replied :
 “ Mr. White, I could not estimate the position of the
 “ *Chester* so closely as to tell when she would cross that
 “ particular rip. The tide sets across there in a dis-
 “ tinct line. It was impossible for me to look out for
 “ my ship and my navigation, and, watching the
 “ *Chester*, to tell when she was approaching that line
 “ with sufficient certainty to base my own action on it.”

Captain Metcalf is a man of far more than average intelligence. He had been a master mariner for twenty-eight years at the time of the collision, and had commanded the *Oceanic* at least eleven years. It was conceded that she was sufficiently well found and equipped in every respect. It was conceded that she came into port fully complying with all the rules of navigation regulating the conduct of a steamship under way in a fog. She was proceeding with speed just sufficient to subject the vessel to the command of her helm. She had competent lookouts properly stationed and vigilant in the discharge of their duties; she gave constant fog signals, and had ability to promptly change her course. She was guilty of no negligence in these respects.

The *Colorado*, 1 Otto, 692.

The *Franconia*, 4 Bened., 181.

The *Hansa*, 5 Bened., 581.

It is not claimed that the *Oceanic* could have seen the *City of Chester* any sooner than she was observed. It is not claimed that the *Oceanic* was proceeding to enter the harbor in such a way as by her position to endanger outbound vessels under steam. The position and course of the *Oceanic* was abundantly established by the testimony of her officers and the pilot, Louis Meyer. The reason of her course was fully explained by Captain Metcalf. There was no question raised as to the correctness of the captain's statement that the north side of the bay was that which an incoming steamship should properly and ordinarily does take; and her course from the whistling buoy to Point Diablo was testified to by those who alone could best know. Notwithstanding the effort made to show the effect of the tide upon a tugboat floating in the flood tide, the fact remained that the *City of Chester's* position at the bottom of the bay was in accordance with the evidence given by the officers and pilot of the *Oceanic*. The testimony of Captain T. P. H. Whitelaw and that of Second Officer Bridgett is conclusive on this question; and Mr. Westdahl conceded at the close of his examination that if the position of the *City of Chester* is where Whitelaw located her on the day of the disaster, and which he and Second Officer Bridgett, two years later, verified by actual soundings, then the collision itself must have occurred where the officers of the *Oceanic* locate it.

As to what occurred on the *City of Chester* prior to and at the time of the collision :

Clitus Barbour, a passenger on the *City of Chester*, called by plaintiff, said: "I was on the left side * * *
 " I looked up and saw apparently across the way or
 " across the bows of the steamer I was on a large
 " steamship probably a couple of hundred yards away.
 " *The next I knew, we crashed into it.* There was a dull
 " thud, a bump, reminding me somewhat of the bumps
 " that ferry-boats have when they strike the piers.
 " * * * They were not crossways exactly. * * *
 " *It appeared to me as if our boat was trying to run*
 " *round the end of them and missed it and struck.*
 " *The other steamer appeared to be coming under a*
 " *very slow headway, as near as I can remember.*
 " *I was looking closely at it, too. I did not think of*
 " *any collision.*" This is the inartificial story of a
 landsman. In its way it is the counterpart of that related by the officers and pilot of the *Oceanic*. They say the *City of Chester* came along as though she was under the influence of her port helm. "She came right
 " along and struck the *Oceanic* right in the bow"
 (testimony of Second Officer Bridgett).

We have no disposition to discuss or criticise the testimony of the officers of the *City of Chester*; but we contend that it in no respect tends to contradict that of the officers and pilot of the *Oceanic*, except as to the point of contact between the vessels. As to this, we are satisfied that the preponderance of the evidence will be found to be in favor of this appellant.

We contend that the evidence shows that the *Oceanic* was navigated in full subordination to the rules of navigation, and with all reasonable prudence under the

circumstances: That the collision was caused by the *City of Chester* having been caught in the eddy tide off Fort Point, and the flood tide taking her on her port bow caused her to run against her starboard helm and across the bows of the *Oceanic*; that when the danger was observed the *Oceanic* promptly stopped and reversed, and that the whole case fails to show that the defendant was guilty of any wrongful act, neglect or default towards the plaintiffs or the deceased persons whom they represent.

The opinions of all the nautical men on board the *Oceanic* concurred that the *Oceanic* was properly and safely navigated in every respect, and that all was done by her officers and pilot that could have been done, under the conditions present, to avoid the collision. This view is, of course, subject to the usual and obvious criticism that, while without interest in the result of the action, or any other imaginable interest for that matter, except that of their reputation as navigators, they are testifying in their own exculpation. Yet we submit that their opinions are entitled to careful consideration. Whether it would have been possible for the *Oceanic* to have prevented the accident by other means than those adopted is a question which certainly involves great professional knowledge; and the Court is to judge of the value of the opinions given under oath of these experts, as well as of the value of the evidence upon which they are founded. They may, perhaps, assist the Court in determining the questions involved here, founded as they are upon facts within their great experience, and not upon mere theory or abstract reasoning.

But the testimony of the officers and pilot of the *Oceanic* as to what occurred on board of her is entitled to full credit. The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who form or judge opinions merely from observation, *a fortiori* when their testimony is wholly uncontradicted.

The *Alexander Folsom*, 52 Fed. Rep., 403.

The *Hope*, 4 Fed. Rep., 89.

The *Wiman*, 20 Fed. Rep., 248.

The *Alberta*, 23 Fed. Rep., 807.

The testimony of the captain and officers of the *City of Chester*, except with respect to the precise location where the disaster occurred, does not tend to contradict that of the officers of the *Oceanic*. In fact it is rather corroborative thereof. The *City of Chester* in going out to sea intended, doubtless, to hug the southern shore of the bay. It was, says Captain Wallace, the usual course of outward-bound steamships. The weather was moderately clear for some distance, and the *Chester* ran at full speed. Near the Presidio she passed into the fog. He says that he then went at half speed. He does not claim that the flood tide acting against his starboard helm carried him across the bay and into the *Oceanic*. This action was voluntary on his part, if he is to be believed. He says: "Then it got very thick, " and just at that time I heard a steamer *outside of us*. " *She seemed to be right ahead. She blowed two whistles,* " *and I answered with two.* I will state that before that

“ we had slowed the ship down before where we ran into
 “ where it was very thick and proceeded on; and a little
 “ further down *I heard this ship blow two more whistles.*
 “ *I answered them with two whistles. I put my helm the*
 “ *first thing hard to starboard when I heard the first*
 “ *whistle.* I had not seen anything of the ship at that
 “ time. I saw the spar buoy off Fort Point about 100
 “ or 150 feet off our port bow, and I immediately saw
 “ that it was an utter impossibility with the helm hard
 “ a-port to clear the *Oceanic.* I rang the indicator full
 “ speed astern *and let the flood tide take her bow, her*
 “ *stern being still in the eddy, and let her swing right*
 “ *around,* and in less than two minutes she crashed into
 “ us and cut us more than half way in two.”

Rufus Comstock, engineer on board the *City of Chester*, said: “ We left Broadway wharf at 9.05, I
 “ think, and ran full speed until about quarter to ten,
 “ and then we slowed down to half speed, and about a
 “ minute or a minute and a half after that we got a bell,
 “ ‘ full speed astern.’ ”

Ferdinand Westdahl was called by plaintiffs as an expert navigator. He detailed some experiments made by drifting the *Gipsy* in the tide on September 5, 1888, to determine the position of the *City of Chester* at the time of collision, and undertook to show how that wounded and water-logged steamer would have drifted, from the place where Captain Wallace located the collision, before she would sink. He made several attempts on September 5, 1888. The tide when he experimented was nearly full. His reference to the tide books showed that on August 22, 1888, it was low water at 5.53 A. M.,

and high water at 12.53 noon. On September 5th, it was low water at 4.40 A. M., and high water at 11.29 A. M. His observations began at 10.19 and ended at 10.56 A. M. On September 10, 1888, he tried to locate the wreck. He placed it some distance north of the 40-fathom mark, shown on the chart. It will be noticed that his experiments were made at a different state of the tide from that which existed when the collision occurred, and for that reason, if no other, were valueless. All he could say was that, *if* the tide was exactly the same at the time of the collision as it was when he went floating around on the little *Gipsy*, the collision between the two ocean steamships must have occurred one-third of the way between Fort Point and Lime Point, if not farther! His examination did not prove that he ever found the wreck. His statement was: "And we swept along the bottom with a line weighted with great bars and window weights *until we finally caught on to what we supposed was the City of Chester—the wreck of her.* I determined where she was then, or where was *what we supposed to be the City of Chester!*" But he knew nothing of the depth of water in which his supposed find lay. He made no soundings. When asked on cross-examination where the collision occurred,—assuming that the *Chester* was adrift six minutes before she sunk, and that she now lies where Captain Whitelaw, the wrecker, located her on the day of the accident, and where Whitelaw and Bridgett two years later found her without difficulty,—he said that the collision must have occurred just about where all the officers or the *Oceanic* assert that it happened.

We submit that the testimony of this witness does not tend to establish even a contradiction of that furnished by the defendant as to the location of the *City of Chester*, or the place of the collision. Captain White-law was perfectly sure that a line commencing at Point Bonita light, and protracted through Point Diablo, intersects the wreck. He located the wreck and established this line the very day of the collision. He said: "I am positive of that line because I ran down after it had been drawn two years. I edged over here [showing] until I got that in line, and steamed down slowly until I opened a range here [showing]. The very moment I saw the bow of the boat cross the range, I ordered the tug to stop, and the moment she settled back, as it was flood tide, I dropped the lead and *hit the wreck at once.*"

"*By the Court*—From the bearing of the land and the sea, was the wreck nearer to Lime Point than it was to Fort Point?"

"A. Yes, sir; it is about three-fifths of the distance towards Lime Point, and two-fifths from Lime Point this way. It was three-fifths from the San Francisco shore towards Lime Point, and I estimated two-fifths of the distance from Lime Point this way [pointing]."

"*By the Court*—Q. She is nearer to Lime Point than she is to Fort Point?"

"A. Yes, sir."

"Q. By this proportion?"

"A. Yes, sir."

We repeat, there can be no reasonable doubt, it seems to us, that the witnesses, mariners and lands-

men, who swear that the *Oceanic* came in on the south side of the bay, and collided with the *City of Chester* close to the shore on that side, are totally in error, because :

1. The *Oceanic* came in shaping her course for the North Head ;

2. The north side of the entrance was the side usually taken by steamships entering the harbor in foggy weather. The south side was usually taken by out-bound steamers ;

3. She picked up the whistle at Bonita Point ;

4. She steered for the nine-fathom buoy, and kept on the north side of mid-channel ;

5. She passed within hailing distance of the British ship *Lord Wolseley*, at anchor *two miles from the North Head, north of mid-channel*. The position of the *Lord Wolseley* is marked "B" on the chart in evidence, and was fixed by Captain McLaughlin of the tug *Relief* (trans., p. 285) ;

6. She passed in sight of the high land on Point Bonita ;

7. She passed in plain sight of Point Diablo, one-quarter of a mile away ;

8. The wreck itself lies directly in this line of progress.

We submit that if any fact in this case is proven, not merely by a preponderance of testimony, but beyond a reasonable doubt, it is that the collision occurred where this appellant claims that it did.

If this be so, then the inference is irresistible that the risk of collision and the collision itself were both wholly

chargeable to the conduct of the *City of Chester*; that, instead of going down the bay and out to sea, the *City of Chester* was going nearly straight across the channel.

We submit that the facts alleged in the answer of the Occidental & Oriental Steamship Company are fully proven by the evidence, and demonstrate that the defendant, the Occidental and Oriental Steamship Company, was, in respect to the collision between the *Oceanic* and the *City of Chester*, occurring August 22, 1888, not guilty of negligence of any description which contributed to the disaster of that day,—was guilty of no wrongful act, neglect or default which caused the deaths of Henry Smith or his daughter Myrta.

W. H. L. BARNES AND
FRANK SHAY,

Proctors for Appellee.

